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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE CONSUELO B. MARSHALL, U.S. DISTRICT JUDGE

- - -

COPY

UNITED STATES OF AMERICA,)	
)	
PLAINTIFF,)	
)	
vs.)	No. CR06-391-CBM
)	
STEVEN PROWLER,)	
)	
DEFENDANT.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, APRIL 19, 2010

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1 LOS ANGELES, CALIFORNIA; MONDAY, APRIL 19, 2010

2 2:00 P.M.

3 - - - - -

4 THE CLERK: Calling Item Number 5, CR06-391, USA
5 versus Steven Erik Prowler.

6 Appearances, please.

7 MS. GARNETT: Good afternoon, Your Honor. Sherilyn
8 Garnett for the United States. Also seated with me at counsel
9 table is Supervisory Special Agent Gary Kiernan and Special
10 Agent Sean Mofferty with ICE.

11 THE COURT: Good afternoon.

12 MR. DYBWAD: Good afternoon, Your Honor. Chris
13 Dybwad on behalf of Mr. Prowler, who is appearing via video
14 conference, and with me at counsel table is Guy Iverson also of
15 the Federal Public Defender's Office.

16 THE COURT: Good afternoon. And so I notice Mr.
17 Prowler is participating, as counsel said, by video, but we
18 can't see his face.

19 MR. DYBWAD: Mr. Prowler, if you sit down -- there we
20 go.

21 THE COURT: All right. Good afternoon, Mr. Prowler.

22 THE DEFENDANT: Good afternoon, Your Honor.

23 THE COURT: So we will depend on you to let us know
24 if you are unable to hear what's being said here or if you
25 can't see.

1 One of the speakers, please let us know and we can
2 correct that.

3 Also, the last time that you appeared by video, I did
4 ask you at that time whether it was your desire to appear by
5 video rather than being here live for your sentencing hearing.
6 You do have a right to physically be here in the courtroom for
7 the sentencing hearing, and I think I explained to you the last
8 time that you appeared by video that if you wished to be here,
9 transportation would be arranged so that you could be here.

10 So do you understand, sir, that you do have a right
11 to be physically present in the courtroom with everyone else
12 for this sentencing hearing?

13 THE DEFENDANT: Yes, Your Honor. I understand I have
14 that right, and I voluntarily waived it. It was my own
15 decision.

16 THE COURT: So it's your desire to not come to the
17 courtroom for the sentencing hearing but to be present or
18 participate at the sentencing hearing by way of video?

19 THE DEFENDANT: Yes, Your Honor. I felt that the
20 transportation and all that would be involved in my stay at the
21 Los Angeles Detention Center would be just too physically and
22 emotionally stressful for me, especially over a period of
23 months, and knowing what -- all that would be involved, I felt
24 this would be better.

25 THE COURT: You were apparently concerned about the

1 time that it would take to transport you from the facility
2 where you're presently located, bring you here to probably the
3 Metropolitan Detention Center, waiting there for the hearing,
4 and then the time that would be consumed while you attended the
5 hearing, and then waited to be transferred back or waited to be
6 transferred to whatever facility you would be serving your
7 sentence, the time that it would take to do all of that, you
8 had some concerns about that?

9 THE DEFENDANT: I had serious concerns about its
10 effect on my emotional and physical health.

11 THE COURT: And, sir, you probably realize, and your
12 attorney has probably discussed this with you, there is no
13 assurance that after the sentencing hearing that you would
14 remain at the facility where you're presently located, so it is
15 still possible after the sentence is imposed that you may be
16 transferred from that facility to a different facility.

17 Are you aware of that?

18 THE DEFENDANT: Not really, Your Honor.

19 THE COURT: And if that were the case, would that
20 change your position as to whether you wanted to be physically
21 here in the courtroom as opposed to participating by video at
22 this sentencing hearing?

23 THE DEFENDANT: No, that would not change my decision
24 to proceed today as we're doing.

25 THE COURT: All right. Your attorneys have probably

1 advised you that even when recommendations are made by counsel
2 as to which facility within the Bureau of Prisons you should
3 serve your sentence and the Court recommends to the Bureau of
4 Prisons that you go to a particular facility for serving your
5 sentence, that it's the Bureau of Prisons that decides where
6 that will be, and they do not necessarily follow the
7 recommendation of the Court or the desire of you or your
8 attorney as to where you will serve your sentence.

9 Are you aware of that, sir?

10 THE DEFENDANT: Yes.

11 THE COURT: Okay. So you still may be transferred
12 from where you're presently located to a different place, and I
13 understand you to be saying that even if that is the case, you
14 still prefer and it is your desire to participate by video
15 rather than being here in the courtroom --

16 THE DEFENDANT: That's correct.

17 THE COURT: -- is my understanding correct?

18 And so where are you presently?

19 THE DEFENDANT: I'm located at FCI Seagoville, Texas.

20 THE COURT: And how long have you been at that
21 facility?

22 THE DEFENDANT: It's roughly about two-and-a-half
23 years.

24 THE COURT: All right. Thank you, sir.

25 I want to raise another matter as well. The last

1 time that you participated by video at a hearing, we did not go
2 forward with the sentencing hearing because the Court felt that
3 there were things that needed to be done before the Court was
4 ready to proceed with the sentencing. And one of the things
5 that I raised was the fact that you did not have an attorney
6 present at the facility where you are located.

7 Now, there are two attorneys present in the courtroom
8 and, of course, they are representing you, but neither of them
9 is at the facility where you're located. I had some concern
10 about that. I raised that concern, so I want to explore with
11 you a little bit about that.

12 It is correct that there is no attorney presently at
13 that facility with you representing you for purposes of the
14 sentencing hearing, am I correct?

15 THE DEFENDANT: That's correct, Your Honor.

16 THE COURT: Have you met with counsel and actually
17 talked with counsel about your sentencing hearing since the
18 last appearance where you participated by video?

19 MR. DYBWAD: And, Your Honor, if you would include
20 telephonically in that question.

21 THE COURT: So have there been meetings between you
22 and your attorneys who are representing you for purposes of the
23 sentencing since you've last appeared by video? And counsel
24 has asked that the Court include telephonic communications.

25 THE DEFENDANT: What -- we've had a number of

1 telephone conversations and written correspondence. We have
2 not had a personal face-to-face meeting.

3 THE COURT: And how do you feel about that?

4 THE DEFENDANT: We had a number of --

5 THE COURT: I was going to ask you --

6 THE DEFENDANT: How did I feel about it?

7 THE COURT: Yes. Do you feel that you are ready to
8 proceed with the sentencing hearing even though there have been
9 no face-to-face conversations between you and your attorney
10 since the last hearing?

11 THE DEFENDANT: Yes, I feel I am ready to proceed. I
12 feel that Mr. Dybwad has fully answered my questions and has
13 addressed my concerns in all our previous communications since
14 then.

15 THE COURT: And, sir, the last time I think I
16 identified the various things that I have read and considered
17 for purposes of the sentencing hearing, so I'm going to
18 identify those again, and I want to know if you have read these
19 papers, if you have discussed them with your attorney, and
20 whether you have them with you now as we proceed with the
21 sentencing hearing.

22 So let me identify them first. There is a report
23 prepared by the probation department which gives the Court more
24 information about you. It's the Pre-sentence Investigation
25 Report, and it was disclosed to the parties May 23rd, 2007.

1 Have you seen this report, sir?

2 THE DEFENDANT: Yes. Yes, Your Honor.

3 THE COURT: And have you read it?

4 THE DEFENDANT: Yes, I have.

5 THE COURT: And have you discussed it with your

6 attorneys?

7 THE DEFENDANT: Yes. I did originally.

8 THE COURT: And if there was anything in that report
9 to which you had an objection, did you tell your attorneys
10 about that subject?

11 THE DEFENDANT: Yes. Yes, I did.

12 THE COURT: And do you know whether your attorneys
13 have, in fact, objected by filing something with the Court to
14 those things that are in the Pre-sentence Report to which you
15 have objections?

16 THE DEFENDANT: There was one thing that stands out
17 in my mind that I was very concerned about was a fabrication --
18 somewhere along the line that I had tried to escape from the
19 prison in Bangkok, and the response -- our response to this was
20 addressed in a footnote simply to the effect that I had firmly
21 denied ever trying to escape from that facility.

22 I was most upset about that because I felt that that
23 originated with the authorities in Thailand and it was picked
24 up by the authorities in the United States, and it's possible
25 that that fabrication was used to deny me bail in Thailand and

1 has had a ripple effect.

2 MR. DYBWAD: And, Your Honor -- sorry, Mr. Prowler.

3 And, Your Honor, that objection is contained in the
4 Defendant's Position re Sentencing from the original sentencing
5 proceedings. Mr. Prowler accurately identified that it's
6 contained in a footnote in that pleading.

7 THE COURT: And so the defendant addressed it in the
8 defendant's position paper that you filed with the Court?

9 MR. DYBWAD: The original papers in connection with
10 the original sentencing, Your Honor, yes.

11 THE COURT: Mr. Prowler, I will identify the
12 additional things that I have read for purposes of preparing
13 for this hearing and I want to know for each of these whether
14 you have also read them and discussed them with your attorney.

15 In addition to the Pre-sentence Report prepared by
16 probation, there is a confidential letter. The letter is dated
17 June 25th, 2007 prepared by Probation and the letter was
18 originally prepared for Judge Takasugi's consideration and it
19 starts out, "Dear Judge Takasugi."

20 In that letter, Probation does indicate the sentence
21 that Probation thinks is appropriate to be imposed, as well as
22 the conditions of supervised release, and there are 19
23 conditions. That letter also includes Probation's
24 justification for why Probation calculates the sentence in the
25 manner in which they do.

1 There is an addendum to the Pre-sentence Report, and
2 this is also prepared by Probation. It contains objections by
3 the government that Probation received, and it says, "The
4 government has no factual objections and no objections to the
5 probation officer's recommended application of the guidelines.
6 The government seeks a sentence of 327 months of imprisonment."

7 And then Probation also indicates objections that the
8 defense made, and it indicates, "Although the defendant has no
9 factual objections, he does object to the following sentencing
10 guideline enhancements," and so Probation addresses those as
11 well.

12 Also included is the Judgment and Commitment Order
13 that was prepared as a result of the sentence that was imposed
14 by Judge Takasugi. That is the sentence that was appealed to
15 the Circuit.

16 And then again, there is the Pre-sentence Report,
17 which I mentioned earlier.

18 So, sir, have you seen and discussed with your
19 attorney the confidential letter that I referred to, as well as
20 the objections that were made to the Pre-sentence Report by the
21 government, as well as the defense counsel and Probation's
22 response thereto?

23 MR. DYBWAD: And, Your Honor, if I may preliminarily
24 address part of that question.

25 The defense and Mr. Prowler have never seen the

1 confidential letter. The original sentencing, Judge Takasugi
2 on the record gave what amounted to I believe an accurate
3 summary of that recommendation letter, but that recommendation
4 letter itself has never been disclosed to the defense or to Mr.
5 Prowler, presumably the government as well.

6 THE COURT: So -- but last time that you were in
7 court, this Court, I did not disclose to you the actual
8 confidential letter that's dated June 25th, 2007?

9 MR. DYBWAD: I don't believe so, Your Honor.

10 THE COURT: I generally do, so that's -- I usually
11 make it available to both the defense and the government. And
12 if I didn't do that, then I am prepared to make it available to
13 both sides before we complete the sentencing hearing. But at
14 least it's your memory that you never actually saw the physical
15 letter itself?

16 MR. DYBWAD: And, Your Honor, I hate to misspeak, but
17 it's my memory that I have not seen that confidential letter.

18 I do know that Judge Takasugi gave a detailed summary
19 of its contents, and presumably the Judgment and Commitment
20 Order contains at least whatever proposed supervised release
21 conditions that Judge Takasugi saw fit, but, again, I have
22 never seen the letter.

23 THE COURT: The defense has in its position paper
24 objected to those conditions of supervised release that you
25 felt should not be included, am I correct?

1 MR. DYBWAD: That is correct, Your Honor, and that
2 comes from the original Judgment and Commitment Order of the
3 conditions imposed at that time.

4 THE COURT: All right. Then I'll accept counsel's
5 representation on that.

6 Mr. Prowler, the other document that I have before me
7 is the Defendant's Position re Re-sentencing. This is a
8 document that was filed October 13th, 2009.

9 And so my question again, sir, is have you read this
10 position paper and had an opportunity -- or actually discussed
11 it with counsel who are representing you at the sentencing
12 hearing?

13 THE DEFENDANT: Yes, Your Honor. I have seen that
14 and we have discussed it.

15 THE COURT: I also have and have read for purposes of
16 this sentencing hearing the Government's Supplemental
17 Sentencing Position re Re-sentencing. This is a document also
18 filed October 13th, 2009.

19 Have you read this paper and discussed it with your
20 counsel?

21 THE DEFENDANT: I'm not sure about that one, Your
22 Honor. I did read the original pleading from the government.
23 I'm a little confused now as to whether that's -- whether
24 that's what you are referring to.

25 THE COURT: This document that I have just referred

1 to was actually filed October 13th, 2009. It's entitled
2 Government's Supplemental Sentencing Position re Re-sentencing,
3 so I don't believe that this is the document that was prepared
4 for the original sentencing hearing.

5 So should I understand, sir, that you do not know
6 whether you actually read the government's supplemental
7 sentencing position and discussed that with your attorney?

8 THE DEFENDANT: I'm sorry. I am recalling now that I
9 did read that. That was provided to me by Mr. Dybwad.

10 THE COURT: Now, one of the reasons I was delayed in
11 taking the bench this afternoon is some additional things have
12 been filed that I was trying to read before I took the bench,
13 so I want to ask you about those.

14 There is a Supplemental Information re Re-sentencing,
15 and this was actually filed I believe on April 13th of this
16 year, but I did not see it until just this morning, and that's
17 just because I wasn't here at the time that it was filed.

18 Attached to that are Exhibits A, B and C. And those
19 exhibits give the Court more information about things that you
20 have done, programs that you've participated in, inmate skills,
21 development plan, a certificate indicating that you have
22 completed certain programs that were offered by the Bureau of
23 Prisons, and then Exhibit C is a poem that you have written
24 entitled Figure Eights' Infinite Paths, so that is something
25 else that I have read.

1 Sir, is that a document that you have seen, read and
2 discussed with your counsel?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: And then this afternoon just before I
5 took the bench, brought to my attention was the government's ex
6 parte application for an order sealing certain documents. A
7 declaration of government's counsel is attached thereto, and
8 the documents that are referenced are the Victim Impact
9 Statements re Sentencing.

10 So that document was -- I'm not sure of the file
11 date, but the last page shows that it was either mailed or
12 provided or served upon the public defender's office on April
13 the 16th.

14 So I would first just ask defense counsel, have you
15 seen the document that I just described?

16 MR. DYBWAD: I have, Your Honor. I don't believe Mr.
17 Prowler has. I attempted to mail-serve at that point Mr.
18 Prowler, but I've received and reviewed it, but I don't believe
19 he has yet.

20 THE COURT: Is this a document that you feel that you
21 should discuss with him so that he has an opportunity to
22 address it through you or himself before we complete the
23 sentencing hearing?

24 MR. DYBWAD: Your Honor, I believe we can go forward
25 at this time. And the way I was going to propose to the Court

1 that we go forward is when the Court is ready to start argument
2 after the defense argues and the government argues, I was going
3 to propose that we can take a five-minute break to allow me to
4 telephonically confer with Mr. Prowler and answer any questions
5 he has at that point.

6 I'm prepared to address the information contained
7 therein as of right now.

8 THE COURT: All right. So, Mr. Prowler, I think
9 you've heard defense counsel indicate as to this Victim Impact
10 Statement, he's reviewed it. He has not provided it to you for
11 your review, and you have not had a discussion about this
12 document, but he does ask at some time during these proceedings
13 the Court take a recess, counsel will then call you by phone
14 and will discuss with you anything that he feels the two of you
15 need to talk about before the Court completes the sentencing
16 hearing.

17 So is that acceptable to you?

18 THE DEFENDANT: It is acceptable, Your Honor.

19 THE COURT: Those are the things that I have read to
20 prepare for the hearing today.

21 I do want the record to reflect, so counsel are
22 aware, the defendant is aware, I have not read the original
23 sentencing papers. So the position papers that were filed
24 prior to the sentencing by Judge Takasugi, I have not read
25 those. I know that they are part of the file and, certainly, I

1 could read them, but I just haven't read them, so I want you to
2 know that.

3 Because this is a re-sentencing, the Circuit having
4 remanded the case so that the Court could sentence again, I
5 didn't feel it was necessary to go back and read the original
6 position papers, so I've only read those supplemental papers
7 that have been filed.

8 So if either counsel believes that the Court should
9 read, before the Court completes the sentencing hearing, the
10 original position papers that you filed with the Court, you may
11 need to review those, bring that to my attention, and then I
12 will, obviously, review those before I impose the sentence, but
13 I do want you to know that I have not read them. And even if I
14 have, I don't remember what's included in them at this point.
15 So for purposes of this hearing, I'll be relying upon those
16 documents that I've identified which have been reviewed by the
17 Court.

18 Is there anything else that I failed to mention that
19 has been filed? And, of course, that could include your
20 original position papers that you feel that the Court should
21 review before the Court imposes sentence.

22 MR. DYBWAD: Your Honor, I have listed three
23 documents. There were actually two documents with the same
24 title of Defendant's Supplemental Information re Sentencing.

25 One of them was manually filed, and I believe that's

1 the one that the Court alluded to that contained the Bureau of
2 Prison's progress report.

3 There was another one that was e-filed that
4 contained -- I believe it's Document 95. It contains some
5 additional exhibits regarding Mr. Prowler's Torah studies.

6 THE COURT: When was it filed?

7 MR. DYBWAD: Unfortunately, I've hole-punched
8 directly through the date.

9 THE COURT: What is the document number?

10 MR. DYBWAD: Document Number 95, Your Honor.

11 THE COURT: Ninety-five. Now, I may have read that
12 document in preparation for the hearing last time, but I'll ask
13 someone on my staff to locate that document so that at least I
14 can have it before me and I will be able to tell you whether
15 it's something that I previously read.

16 And then was there another document as well?

17 MR. DYBWAD: There were two other documents which I
18 believe the -- which the Court alluded to.

19 There was a defense Objection to Supervised Release
20 Conditions in accordance with what the Court indicated one
21 subject it wanted to address at the re-sentencing, and the
22 government also filed a response to the defendant's objections
23 to the supervised release conditions.

24 I believe Mr. Prowler has the defense filing but
25 probably not the government filing.

1 THE COURT: And, again, I believe that the Court's
2 read both of those. I don't have those documents before me at
3 this moment, but because I am aware that the defense did object
4 to conditions of supervised release and I'm prepared to comment
5 on those and I'm also aware that the government responded to
6 those, I believe those are documents that I have read, but I
7 don't have them before me on the bench this afternoon, I
8 believe.

9 Let's see. One of my law clerks has given me a note
10 that might refresh my recollection.

11 Okay. Apparently, the clerk will print out those
12 documents, and so before we complete the sentencing hearing, I
13 will have reviewed them.

14 MS. GARNETT: Your Honor, I'd also like to -- I'm not
15 sure if the Court referred to the Amended Declaration of Gary
16 Kiernan with the accompanying exhibits, but that was a document
17 that we also filed.

18 THE COURT: That was filed by the government?

19 MS. GARNETT: Yes, on November 20th, 2009. It's a
20 sealed document.

21 THE COURT: And I don't know if that's the document
22 that I reviewed, but, again, since it's been called to my
23 attention, I'm sure the clerk will make sure that I get it, and
24 I'll put something on the record once I have read it. And it
25 may be that I previously read it and just am not remembering at

1 the moment, but I know I don't have it before me at this time.

2 The defense has that document?

3 MR. DYBWAD: I do, Your Honor.

4 THE COURT: And is that a document that you have
5 discussed with Mr. Prowler?

6 MR. DYBWAD: Discussed the contents. For various
7 reasons of the information contained within it, I have not
8 mailed it to Mr. Prowler.

9 THE COURT: So what I think should be done with these
10 documents that counsel indicates that you may have had a
11 discussion on the subject of the document but not actually
12 mailed it to the defendant or actually discussed it with him,
13 before we complete the sentencing hearing, you have that
14 telephone conversation with Mr. Prowler, then this is one of
15 the things that you need to discuss with him.

16 So, Mr. Prowler, one thing that would typically
17 happen if you were here in this courtroom where the sentencing
18 hearing is taking place, all of these documents that we're
19 referring to that maybe you have not yet read or just don't
20 remember them or maybe have not yet discussed them with
21 counsel, or you discussed them, but you didn't read them or you
22 don't remember them, I would give you the opportunity to read
23 them before I completed the sentencing hearing.

24 Because you're not physically here in the courtroom,
25 we can certainly get these documents to you. It's just a

1 matter of making them available either by fax or some
2 electronic means or some other means, and we can still do that
3 if these are things that you would want the opportunity to have
4 time to review them, to also discuss them with your counsel as
5 to what impact they may have upon the sentencing itself.

6 So we will move along, but I will ask you later
7 whether you want to review any of these documents. If you do,
8 I'll make sure that counsel provides them to you. And then
9 once you've read them, you may want to discuss them with
10 counsel, and if that's your desire, then counsel would arrange
11 that discussion.

12 I had actually indicated at the last hearing that I
13 felt the better procedure was to have counsel present at the
14 institution where the defendant is located, that one counsel
15 would be here in the courtroom, one counsel would be there so
16 that we would all be assured that Mr. Prowler was looking at
17 the same documents that we have before us and that the Court is
18 considering.

19 And I know that counsel made a decision that you
20 would do it this way rather than physically having someone
21 there, but the defendant does have a right, obviously, to
22 confer with counsel, and the question is what's the most
23 effective way of doing that.

24 Is it equally as effective to have the defendant at
25 the institution and we all be here in the courtroom or would it

1 be more effective if at least one counsel was present with the
2 defendant?

3 So you might want to put something on the record
4 about that subject, and then I can ask the defendant a few more
5 questions. So I will let defense counsel be heard.

6 MR. DYBWAD: Yes, Your Honor.

7 After the last appearance on this matter, we had,
8 again, discussed again proceeding by video conference with Mr.
9 Prowler and discussed whether it would be sufficient to set up
10 conferring with Mr. Prowler by a telephone line that was not
11 able to be heard by the Court and the court publicly. And
12 after that discussion, we deemed it sufficient to go forward
13 with the re-sentencing, given that Mr. Prowler was present at
14 the original sentencing and through a number of pre-trial
15 motions and is familiar with a lot of -- in fact, if not all,
16 the arguments and information that will be presented again to
17 this Court at this time.

18 THE COURT: And counsel may for the record -- I think
19 generally you did make a statement about the meetings that have
20 taken place between you and Mr. Prowler -- maybe all of them
21 have been telephonic -- or most of them have been telephone
22 since we were last assembled for the sentencing here which was
23 continued and just in what manner you have made materials
24 available to him, discussed with him those materials and feel
25 that at this point you have the benefit of whatever he would

1 want you to raise with the Court at the sentencing hearing.

2 I'm not suggesting that you disclose any confidences
3 or waive attorney-client privilege, but I think the record
4 needs to reflect just how those communications have taken
5 place.

6 MR. DYBWAD: Yes, Your Honor.

7 There were two methods of communication. One was
8 correspondence by mail when Mr. Prowler would articulate
9 questions based on the upcoming re-sentencing and his
10 understanding of the materials as well as any developments in
11 case law, and there was correspondence back and forth
12 addressing those questions. There were also a number -- quite
13 frankly, it's large enough that I can't remember off the top of
14 my head -- a number of telephonic conversations leading up to
15 today's re-sentencing.

16 Additionally, the Court inquired about making sure
17 that the Court had up-to-date information about Mr. Prowler and
18 the facility that he's at.

19 As the Court can tell from the supplemental
20 information that was filed, there is information with a recent
21 progress report from the Bureau of Prisons from FCI Seagoville,
22 as well as other information provided by Mr. Prowler regarding
23 his recent activities, including book reviews, the poem, so I
24 would put that on the record in terms of an information
25 exchange between defense counsel and Mr. Prowler.

1 THE COURT: And you are referring to the document
2 that's entitled Supplemental Information re Sentencing with the
3 attachments A, B and C?

4 MR. DYBWAD: That is correct, Your Honor.

5 THE COURT: And lodged with the Court I think April
6 13th --

7 MR. DYBWAD: That is correct.

8 THE COURT: -- of this year?

9 All right. Then, Mr. Prowler, again, the Court will
10 just permit you to address the Court, if you wish to, sir.

11 Your counsel has just described the method of
12 communicating with you since the last hearing, and I would just
13 inquire of you do you agree with counsel's representations to
14 the Court that those are the various methods of communication?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: And your counsel indicated that things
17 may have been mailed to you and you may have had questions
18 about those things and you would have, in turn, mailed those
19 questions to counsel and then counsel would have mailed some
20 response to you.

21 Is that what you recall occurring?

22 THE DEFENDANT: Yes. I was -- I very carefully
23 looked over everything and wrote letters, very thorough, and I
24 was very satisfied with the replies I got from my counsel.

25 THE COURT: And your counsel also says that there

1 have been telephone calls where you have had -- you had spoken
2 to counsel telephonically, and you agree that that has also
3 occurred?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: And, sir, you are still requesting that
6 we proceed with this sentencing hearing with you participating
7 by video?

8 THE DEFENDANT: Yes. I'm just -- since I've learned
9 that there have been some additional documents filed with the
10 Court that I haven't seen, particularly recent documents, I
11 would want to receive a fax transmission if possible.

12 If that can be done during our proceeding today so
13 that I could discuss them if necessary with my counsel, that
14 would be very much appreciated.

15 THE COURT: All right. Let me hear from counsel as
16 to your position on that. Whether or not these various
17 documents that Mr. Prowler has not seen that have been
18 identified for this record, do you feel that you will be able
19 to have an adequate discussion with him about these papers,
20 such as he suggests, faxing them to him today?

21 He needs an opportunity to review them. He would
22 also need an opportunity to question you, apparently, as he's
23 done in the past, about anything that he may want to question
24 you about, and then you would need to be able to respond to
25 those questions.

1 MR. DYBWAD: I do believe it's sufficient, Your
2 Honor.

3 And if I may add just a little bit more information.
4 The category of documents we're talking about are three
5 documents.

6 The government filed objections -- well, a reply to
7 the defense objections regarding supervised release conditions
8 on Friday. At that point it was too late to get that
9 information to Mr. Prowler, but I believe that I can adequately
10 discuss that over the telephone with him.

11 The government also filed Victim Impact Statements
12 under seal. I believe that that will be addressed during the
13 sentencing and I'll also be able to communicate with Mr.
14 Prowler about the contents of that while the sentencing is
15 ongoing.

16 The government alluded to a third document which I
17 did not provide to Mr. Prowler and, in fact, I don't believe
18 that I can provide to Mr. Prowler; however, the information --
19 due to the nature of the information contained as exhibits to
20 it, however, the information that is contained as exhibits are
21 evidence in this case that all parties are familiar with, and
22 what that document is is a summary of certain parts of journals
23 and other tangible evidence which I have previously discussed
24 with Mr. Prowler.

25 THE COURT: Are you referring to the document -- and

1 I now have it before me -- entitled Amended Exhibits A through
2 U previously filed as attachments to the Declaration of Gary J.
3 Kiernan, K-I-E-R-N-A-N --

4 MR. DYBWAD: Yes.

5 THE COURT: -- in Support of the Government's
6 Position re Sentencing of the defendant? And the document, I
7 don't have a file stamp on it, but --

8 MS. GARNETT: November 20th, Your Honor, it was
9 filed.

10 MR. DYBWAD: And, Your Honor, that is the document
11 I'm referring to.

12 THE COURT: Okay. So does counsel represent it was
13 filed November 20th?

14 MS. GARNETT: Yes, Your Honor.

15 THE COURT: 2009?

16 MS. GARNETT: Yes, Your Honor. And also that
17 document is identical to another document that was filed for
18 the original sentencing that I'm assuming that defense counsel
19 and Mr. Prowler had access to because Mr. Prowler came to the
20 original sentencing or appeared in person.

21 The only difference between the document that was
22 filed in the original sentencing and the one that the Court has
23 before it that there are Bates numbers on the exhibits.

24 MR. DYBWAD: And, again, Your Honor, I believe that's
25 correct. All the information contained in there was discussed,

1 reviewed, made available to Mr. Prowler and was discussed at
2 the original sentencing.

3 THE COURT: And just for Mr. Prowler's purposes, the
4 declaration that's prepared under penalty of perjury by I
5 believe the agent was executed on September 7, 2007 in Bangkok,
6 Thailand.

7 So, Mr. Prowler, the document that we're referring
8 to, you've heard what both counsel have said about this
9 document. The declaration does have exhibits attached to it,
10 and I've identified those as Exhibits A through U, U as
11 in umbrella, and counsel believe that you reviewed this
12 document for purposes of the original sentence hearing.

13 So do you remember that document?

14 THE DEFENDANT: I believe so.

15 THE COURT: And do you believe it is a document that
16 you reviewed and discussed with defense counsel prior to the
17 original sentencing hearing?

18 THE DEFENDANT: What is the name -- what does that
19 refer to, the contents?

20 MR. DYBWAD: Your Honor, if I may, the contents
21 consist of excerpts from journal entries, as well as excerpts
22 from photograph albums I believe we're familiar with. And it
23 purports -- or it doesn't purport, it's a summary of those
24 excerpts.

25 MS. GARNETT: It's essentially a summary of evidence

1 seized from the defendant consisting of what the defense
2 counsel just mentioned, as well as index cards, ledgers,
3 photographs, as well as the reports of investigation in this
4 case, all of which defendant has authored on the stuff that we
5 took from him, and then he has seen the reports from the
6 agents.

7 THE COURT: So with the description given by both
8 counsel in the case, does that help you remember what this
9 document is and what it contains?

10 THE DEFENDANT: So this document was submitted for
11 the original sentencing; is that correct?

12 MR. DYBWAD: That is correct?

13 THE DEFENDANT: All right then.

14 I was just concerned that there was some supplemental
15 documents submitted recently that were not seen by me, but if
16 these pertain to the original sentencing, then that's
17 satisfactory enough for me because I know I was given that
18 opportunity to review everything.

19 THE COURT: Maybe this might be helpful. If there is
20 a way to get this document, this specific document that we're
21 referring to and maybe others as well, to the defendant so that
22 he could see the document, it may help him know whether or not
23 it's a document that he's previously seen and what he'd like
24 for counsel to say about the document.

25 As I said today -- I mean, I've read all these things

1 fairly recently but don't remember each of the documents, the
2 content of every document, so it may be that the defendant has
3 seen the document, he just doesn't remember the document in the
4 manner in which we are describing it.

5 Does the defense have any suggestions?

6 I do have other people in the courtroom. I have
7 other things that I could do this afternoon, so if we needed to
8 take a recess so that counsel would feel assured that the
9 defendant is looking at what we're looking at, maybe we can
10 make that available.

11 MR. IVERSEN: May I have a moment, Your Honor?

12 THE COURT: Sure.

13 *(Counsel confer off the record.)*

14 MR. DYBWAD: Your Honor, again, I believe we're
15 talking about three documents, one of which Mr. Prowler has
16 indicated a familiarity with from the original sentencing.

17 The concern about that document, the declaration of
18 Agent Kiernan, is that, quite frankly, under the current
19 supervised release conditions, Mr. Prowler cannot possess it.

20 We could fax it over -- we can fax the declaration
21 part over to the prison, but someone would need to shred it
22 after that. But, again, I believe Mr. Prowler is familiar with
23 all of that information from the original sentencing.

24 The government's remaining two documents are Victim
25 Impact Statements and the objections to supervised release

1 conditions. Those we could fax over this afternoon.

2 I believe we're in a position to go forward and
3 discuss during a break with Mr. Prowler those two documents
4 which were filed at the end of last week. I do note that the
5 Court has a full courtroom. However the Court wants to
6 proceed. But, again, that one document I don't believe, even
7 if we did fax it over there, someone would need to shred it
8 shortly thereafter.

9 THE COURT: Well, let me say this, Mr. Prowler -- I
10 think you want to say something, so let me let you be heard
11 first, and then I will comment on what your counsel has just
12 said.

13 THE DEFENDANT: My question is actually directed to
14 my case manager who is with me, Mr. Martinez.

15 Do we have the capability in this facility for me to
16 see this document being shredded?

17 VOICE: Yes. We can shred it. Let me see if we have
18 a fax machine.

19 THE DEFENDANT: He said "yes," and he's going to
20 check to make sure that there is a fax machine up here.

21 THE COURT: So you asked that question -- did you ask
22 that question, sir, because you would like to have this
23 document before you but you just want to make sure that the
24 facility has the capability of shredding it once you have seen
25 it?

1 THE DEFENDANT: Well, it's been expressed that this
2 is a document that I suppose could compromise my safety, and if
3 that's the case, it really should be destroyed immediately
4 after I scan it. But I just wanted to stress that it's not my
5 intention in any way to delay the proceedings. I would hope we
6 can move everything along, but I just want to be sure that
7 we've covered all bases and we can just dispose of the material
8 quickly enough.

9 THE COURT: Sir, would you like to see the material
10 that we're talking about, the amended exhibits and declaration?

11 THE DEFENDANT: Is there any reason why -- again, I'm
12 sorry for my hesitancy on this. Is there any reason why my
13 counsel feels I should not see it?

14 MR. DYBWAD: Well, Your Honor --

15 THE COURT: That's a matter that I think you and your
16 counsel can discuss so that he can discuss that with you
17 personally, so I won't try to respond to that.

18 As I've indicated, there will be some time during the
19 course of this proceeding that we'll take a recess and your
20 counsel will speak with you and he can better answer that
21 question.

22 Let me just say a couple of things before we proceed
23 further, and then I'll ask another question of counsel.

24 Most of the discussion that we've had so far, Mr.
25 Prowler, is because I want to be sure that you understand if

1 there is any disadvantage in your not being physically here,
2 what we're going to be doing here, and we will be looking at
3 things that, of course, are not before you so you will not have
4 the opportunity to see those things.

5 So the original sentence that was imposed in this
6 case was ten years by Judge Takasugi, as you know. That was
7 appealed by the government. The Ninth Circuit has remanded it
8 for sentencing, and I will hear from everyone here, including
9 you, before I make a decision as to what the sentence may be,
10 but you must keep in mind the sentence could be higher than the
11 sentence that Judge Takasugi imposed.

12 I think you are aware that both the probation
13 department and the United States Attorney's office have asked
14 for a sentence that's considerably higher than the one that
15 Judge Takasugi imposed.

16 Your counsel, of course, have argued to this Court
17 that the sentence that was imposed, which is a ten-year
18 sentence, is the sentence that should be imposed by this Court.

19 I don't know that that will be the case. So I do
20 want you to understand that you may be looking at a much higher
21 sentence, and if that affects your decision in any way to
22 participate by video conferencing instead of coming physically
23 here to the courtroom, that's something that you need to
24 consider.

25 Before you respond, you might want to discuss this

1 with counsel. And if you'd like to do that, I'll give you that
2 opportunity, but do you understand the statement that I have
3 made?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: So would you like to talk with your
6 counsel before we go further just on this issue as to whether
7 you should still request to participate in this sentencing
8 hearing by video rather than being physically here?

9 THE DEFENDANT: Yes, I would like to discuss all of
10 this with him.

11 THE COURT: Okay. I think this is the break time.
12 And so during this break, I think counsel can do a number of
13 things. You may be able to acquaint and help Mr. Prowler
14 recall the amended exhibits A through U and the declaration
15 such that he is satisfied that he's seen it, is familiar with
16 its content and either wants to see it again by having you make
17 it available to him or doesn't need to see it again.

18 You may also apprise him of those additional
19 documents that we discussed that he has not yet seen and the
20 content of those documents so, again, he would know whether
21 those are documents that he feels that he needs to review
22 before he can proceed with the sentencing hearing.

23 Then I'll let you advise the Court as to whether he
24 still wishes to proceed in this manner or he would prefer being
25 physically here.

1 One of the comments I made earlier is he may be
2 transferred anyway from this facility where he's presently
3 located, so if a part of his reason for not wanting to come
4 here for the sentencing hearing was he's comfortable where he
5 is and he'd like to remain there, that could change anyway, as
6 we all know. Not that I have anything specific in mind, but I
7 just think it's something that he must consider.

8 I do not know, but counsel probably do know, if he
9 were to be transferred here for the sentencing hearing, what
10 that actually entails, how long that's likely to be, how long
11 he would likely be at MDC, all of the things that may be
12 concerning him that's causing him to feel, you know, "I should
13 stay where I am," and participate by video rather than
14 physically coming to the courtroom.

15 I still express concern that there's no counsel there
16 with him, and I don't think counsel is concerned about that.
17 So the Court may be overly concerned, and apparently Mr.
18 Prowler isn't concerned about that either, but at least I think
19 it's something that needs to be addressed.

20 So why don't we take the recess at this time.

21 And how much time should I give you? I don't know
22 that 15 minutes is adequate, but if that's what you think is
23 adequate, then I'll take 15.

24 MR. DYBWAD: I think 15 minutes would be adequate.

25 THE COURT: Okay. We'll take a 15-minute break.

1 In the meantime, I'll be handling some of the other
2 matters.

3 MR. DYBWAD: Understood.

4 THE COURT: Thank you.

5 *(Recess taken from 2:50 to 3:15.)*

6 THE COURT: Okay. We're back on the record.
7 Appearances have been noted. This is after the break.

8 Mr. Prowler is with us and counsel has had an
9 opportunity to speak with him.

10 And would counsel like to put something on the
11 record?

12 MR. DYBWAD: Yes, Your Honor, and I'll put it in a
13 very summary fashion.

14 I believe we only have 15 minutes left -- or at this
15 point probably ten minutes left on the video link, so at this
16 point, we are probably not proceeding forward with the
17 re-sentencing.

18 With regard to -- without going into the substance
19 of the communication, again, there have been three documents
20 that we discussed. The declaration of Gary Kiernan discussed
21 with Mr. Prowler, I believe his memory is refreshed that it
22 contains material that we have previously reviewed in person.

23 The other two documents, the Victim Impact Statements
24 and the government's response to the defense's objections
25 regarding supervised release, were discussed with Mr. Prowler

1 on the telephone, the substance of them.

2 Again, I think we're now in a position where we're
3 not going forward today, and those last two documents could be
4 faxed to his facility and made available to him so that he can
5 review them at his leisure.

6 It's my understanding that Mr. Prowler, but I don't
7 want to speak for him, would still like to go forward with
8 video conference, and that's his position, and it's his right
9 to waive if he's comfortable with it. That's what I would put
10 on the record.

11 THE COURT: All right.

12 Mr. Prowler?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: You've heard the statement made by your
15 counsel. Is it still your desire after speaking with him to
16 proceed by video?

17 THE DEFENDANT: Yes, it is.

18 I want to emphasize I, myself, am a very meticulous
19 and thorough person. I ask many questions. At times I'm
20 accused of asking too many questions, and I've had the
21 opportunity to discuss these documents with counsel.

22 I am satisfied that we've covered everything we
23 should cover. And weighing the pros and cons of my -- again,
24 my physically coming out to Los Angeles -- you know, I'm a
25 great believer in face-to-face communication, but at my age --

1 and my physical and emotional state is such that it would just
2 be too much for me to endure, and I feel satisfied that the
3 video link is adequate and even more than adequate, and I feel
4 that it's really the best option at this time.

5 THE COURT: All right. Sir, so you know that you
6 have a right to be physically present here in the courtroom for
7 the sentencing hearing; is that correct?

8 THE DEFENDANT: Yes, I do.

9 My question to you is if within the next -- let's
10 say, 24 hours -- I were to decide otherwise, could I do that?

11 THE COURT: You could, sir. All you need to do is
12 communicate that to your counsel. He would advise the Court
13 and then we would make the arrangements for you to be
14 transported here to Los Angeles for the hearing.

15 THE DEFENDANT: Thank you very much, but, again, I
16 feel comfortable enough with the video arrangement.

17 THE COURT: Sir, do you make this decision freely and
18 voluntarily?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: No promises have been made to you that's
21 causing you to decide to participate by video rather than in
22 person?

23 THE DEFENDANT: No promises whatever, Your Honor.

24 THE COURT: No threats have been made to you or
25 anyone near or dear to you that's causing you to make this

1 decision?

2 THE DEFENDANT: That is correct, Your Honor. No
3 threats have been made.

4 THE COURT: And you've had a discussion on this very
5 subject with your counsel?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: And he has given you his advice as to the
8 difference between being here in person and participating by
9 video?

10 THE DEFENDANT: Yes, he has. And I can add that as
11 painful as it is for me to endure yet another postponement of
12 the hearings, I know we can take advantage of the additional
13 time to discuss any other loose ends we have. So there is some
14 good to the delay, and I feel sure that this will work out.

15 THE COURT: And, sir, just one final question. Would
16 you prefer having an attorney present at that facility with you
17 as we proceed with the sentencing hearing since you are going
18 to be participating by video?

19 THE DEFENDANT: I think that would be a splendid
20 idea. The other gentleman who was with Mr. Dybwad, perhaps he
21 could come out for the next hearing. I have always had faith
22 in Mr. Dybwad in his presentations in court, and I would choose
23 to have --

24 *(Brief interruption in the proceedings.)*

25 THE DEFENDANT: -- I would choose to have him

1 represent me, and the other gentleman can come out to see me to
2 be here at the hearing. I think that's a good idea.

3 THE COURT: All right. I was just going to ask for
4 counsel, anything further that you believe the Court should
5 place on the record or inquiry that should be made concerning
6 the waiver?

7 MR. DYBWAD: I don't believe so, Your Honor.

8 THE COURT: Government's counsel?

9 MS. GARNETT: I just want to point out for the Court,
10 though, that in government counsel's argument, I do plan on
11 going through the exhibits and pointing to specific references,
12 so I agree with Mr. Prowler that I think it would be an
13 excellent idea to have Mr. Iverson go out and perhaps have a
14 copy of the declaration of Mr. Kiernan with Mr. Prowler.

15 THE COURT: Well, that's what I expected would happen
16 this time.

17 I mean, when we had our last hearing, I think I
18 suggested that there should be an attorney or someone
19 physically present with him, even if it were a paralegal or
20 someone, that had all the documents, could make sure that he
21 has the document, he has the right page so that he knows what's
22 being discussed, and I still feel that that is one way of doing
23 it and counsel should consider that.

24 Obviously, your counsel and your reasons for doing it
25 differently may be very good reasons, and I'm not asking that

1 you share those with the Court, but I am concerned that the
2 defendant does not have the ability to have all the documents
3 that are going to be used and to have someone with him who can
4 tell us that he's now looking at the document, he's reviewed
5 the document, he has questions about the document, so I still
6 think counsel should consider that.

7 MR. DYBWAD: And, Your Honor, two quick points.

8 I think given the present posture, perhaps setting a
9 next date doesn't make sense. If the parties can discuss --
10 I'll need to inform Mr. Iverson that perhaps he's going to
11 Texas. If we could have some time and then contact the Court's
12 clerk about setting up the re-sentencing date formally, that's
13 my first point.

14 The second is I understand the Court and the
15 government's concern that Mr. Prowler have all the exhibits in
16 front of him. I have concerns that who's ever traveling with
17 the Kiernan declaration may need perhaps an order from the
18 Court or some other -- the moment -- the materials are arguably
19 in violation of the Adam Walsh Act and some other provisions,
20 and who's ever traveling with those materials or what
21 happens -- perhaps the government can mail the materials
22 themselves to a designated person at the facility so that one
23 lawyer from our office is not transporting them and that they
24 can be reviewed in person at the facility and then destroyed
25 after that presentation.

1 THE COURT: Your office is an excellent office, so I
2 know that you will figure out the best way to do this, and I
3 don't think that I need to be involved in that decision, but I
4 do think it's important for him to have the documents before
5 him. But I would like to set a date, even if we have to change
6 the date, since we have the defendant present.

7 So I'm going to ask Mr. Levario, what would be the
8 next date available to us. I think this hearing will take
9 about two hours.

10 Next time I won't have to go through again, probably,
11 the waiver information that I went through today or the
12 documents that the Court has if you don't file anything more.

13 But what would be the next date?

14 I'm not here for the month of May, so I know it won't
15 be in May, and I'm only here a part of June, so I think it's
16 going to be a date that's far enough away that everybody will
17 have time to be ready for it.

18 THE CLERK: June 21st.

19 THE COURT: June 21st. So unless that conflicts with
20 some date -- government's counsel, not a good date for you?

21 MS. GARNETT: I will be out of the district. If we
22 could go maybe just one week later.

23 THE COURT: Okay.

24 THE CLERK: June 28th.

25

1 THE COURT: June 28th. That date seem to be good for
2 everyone or not good for everyone?

3 MS. GARNETT: Not so good.

4 THE COURT: Shall we go to July? Because I think
5 we're at the end of June.

6 MS. GARNETT: Government's counsel would prefer
7 August, early August, but that's --

8 THE COURT: Well, you know, August is not such a good
9 month for the Court. So I don't know whether we have any
10 August dates, but why don't we do this. Why don't I let Mr.
11 Levario give us a date in July, then counsel meet and confer,
12 and if that date is a conflict for you or any witness that you
13 were hoping to have present or anyone that you think needs to
14 be present, then you could agree on a different date. So if it
15 has to go into August -- and it could be an August date.

16 What would be the July date?

17 THE CLERK: July the 12th.

18 THE COURT: July 12th. So I'm going to set it for
19 July 12th.

20 At 1:30?

21 THE CLERK: Yes, Your Honor.

22 THE COURT: At 1:30, with the understanding that
23 counsel will meet and confer, and if that date doesn't work,
24 you'll get another date from Mr. Levario.

25 And so, Mr. Prowler, we are continuing the matter to

1 July the 12th at 1:30, but it may be necessary to even continue
2 it beyond that to find a date that's good for everyone.

3 You understand?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: The final question I just wanted to
6 ask -- I think I know the answer -- we do not have any of the
7 victims present in the courtroom, am I correct?

8 MS. GARNETT: No, Your Honor.

9 THE COURT: So there is no one that needs to be
10 ordered back?

11 MS. GARNETT: No, Your Honor.

12 May I make a request, Your Honor?

13 THE COURT: Yes.

14 MS. GARNETT: Earlier you had indicated that you had
15 not read the initial sentencing position papers, and I would
16 ask if the Court has time to read the initial sentencing
17 position papers of both parties.

18 THE COURT: It's not a matter of time. I'll just go
19 back -- I probably read them, I just don't remember them, so I
20 should go back and read them anyway so that I can understand
21 the arguments being made.

22 What I will do is I will ask Mr. Levario to identify
23 everything that I think constitutes the previous filings and to
24 send that out to both sides, so if there is any other document
25 that's not on the list, if you will advise him of that, then

1 I'll review that document as well.

2 MR. DYBWAD: And, Your Honor, along those lines, if
3 the Court could disclose the confidential recommendation letter
4 to the parties.

5 THE COURT: I'll ask Mr. Levario to just show it to
6 you here while you're in the courtroom.

7 MR. DYBWAD: Thank you, Your Honor.

8 THE COURT: Okay.

9 MS. GARNETT: Thank you, Your Honor.

10 THE COURT: All right. Thank you. The matter is
11 continued to the date and time indicated by the Court.

12 This does complete the hearing today, Mr. Prowler.

13 THE DEFENDANT: Thank you, Your Honor.

14 *(Proceedings concluded.)*

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CERTIFICATE

I hereby certify that pursuant to Section 753,
Title 28, United States Code, the foregoing is a true and
correct transcript of the stenographically reported
proceedings held in the above-entitled matter and that the
transcript page format is in conformance with the
regulations of the Judicial Conference of the United States.

Date: SEPTEMBER 27, 2010

Cindy L. Nirenberg, CSR No. 5059